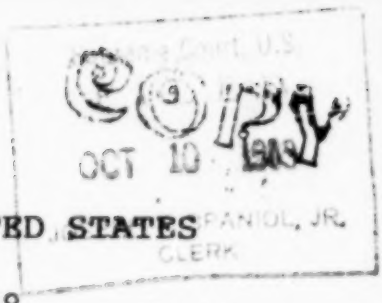

NO. 88-6873
In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

CHANDLER CLEMONS,
Petitioner,
v.
STATE OF MISSISSIPPI,
Respondent.

On Writ of Certiorari To The Supreme Court of The State of Mississippi

BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MISSOURI, NEVADA, NEW JERSEY, NEW MEXICO NORTH CAROLINA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, UTAH, AND WYOMING

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INTEREST OF AMICI CURIAE

Amici curiae are states which have authorized the imposition of death as a potential penalty in specified homicide cases. Each state automatically provides, or makes available, some form of appellate review following a judgment of death. In reliance upon this Court's assurance that there is no "right way for a State to set up its capital sentencing scheme," *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), the states have taken a variety of approaches with respect to the scope of

and procedures applicable to such review. A number have concluded that the invalidation of one or more aggravating factors does not necessarily compel the reversal of a death sentence. Rather, some form of harmless error analysis is appropriate. The argument presented by petitioner Clemons, if accepted by this Court, could thus jeopardize a substantial number of capital judgments in several states. It would substantially erode the authority of the states to enforce and monitor their capital punishment statutes.[1/]

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1. The sole question upon which this Court granted certiorari, *Clemons v. Mississippi*, ___ U.S. ___, 109 S.Ct. 3184 (1989), was presented in the petition as follows: "Does the Eighth Amendment permit an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority for capital sentencing under state law rests exclusively with the jury?" In the brief on the merits, however, petitioner argues at some length that the Mississippi Supreme Court has inadequately narrowed the state's "especially heinous, atrocious or cruel" aggravating circumstance. Amici limit our discussion to the specific issue presented, namely the authority under the Eighth Amendment for a state court to affirm a death judgment, assuming the presence of an invalid aggravating circumstance. Other points raised by petitioner are dealt with in Mississippi's

SUMMARY OF ARGUMENT

Once a state has decided to enact a capital punishment scheme, it is primarily responsible for interpreting and enforcing those statutes. This includes appellate review of death judgments. Although a state may decide that penalty phase errors require reversal of the death sentence, the Eighth Amendment does not compel such a conclusion. Reversal of one or more aggravating circumstances does not mandate a new sentencing hearing. The state court may apply harmless error analysis and find, based on other proven aggravating circumstances and the inadequacy of any mitigation, that the death verdict is nevertheless reliable and should be affirmed.

This Court has previously upheld the authority of the states to affirm death judgments despite the invalidation of an aggravating circumstance. *See, e.g., Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); *Wainwright v. Goode*, 464 U.S. 78 (1983). It specifically invited Oklahoma to undertake such an analysis, if permitted by state law, in *Maynard v. Cartwright*, __ U.S. __, 108 S.Ct. 1853 (1988). The

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brief on the merits.

position urged by petitioner is not only inconsistent with these cases, it would effectively preclude the states from enforcing their capital judgments despite a determination that any error could not have prejudiced the defendant. Although the "evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer," *Satterwhite v. Texas*, ___ U.S. __, 108 S.Ct. 1792, 1798 (1988), it is not impossible. State courts should be allowed to determine whether any error was harmless, and if so, to affirm the sentence of death.

ARGUMENT

THE EIGHTH AMENDMENT DOES NOT REQUIRE THE REVERSAL OF A DEATH SENTENCE SIMPLY BECAUSE AN AGGRAVATING CIRCUMSTANCE IS INVALIDATED IF THE STATE COURT, PURSUANT TO ITS APPLICABLE HARMLESS ERROR ANALYSIS, CONCLUDES THAT THE DEFENDANT WAS NOT PREJUDICED.

This Court has consistently emphasized the need for reliability in the imposition of death sentences. *See, e.g., Johnson v. Mississippi*, ___ U.S. ___, 108 S.Ct. 1981, 1986 (1988); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). It has also noted the important role provided by state appellate review in ensuring reliability, while recognizing the variety of forms such review might take. *See, e.g., Pulley v. Harris*, 465 U.S. 37, 53 (1984); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976); *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).[2/]

In *Zant v. Stephens*, *supra*, 462 U.S. at 890, this Court relied upon the "important procedural safeguard" of state

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2. The Court has not had occasion to decide whether appellate review of death sentences is required by the Eighth Amendment. That issue is now pending before the Court in *Whitmore v. Arkansas*, No. 88-7146, cert. granted July 3, 1989.

appellate review in holding that "the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty . . . ." Under Georgia law the jury does not give any special weight to aggravating circumstances; their function is to narrow the class of persons eligible for the death penalty rather than to guide the sentencer's exercise of its discretion. 462 U.S. at 873-874. The Court declined to express any opinion on whether it would reach a different result under a statutory scheme which specifically required the sentencer to weigh aggravating and mitigating circumstances in deciding whether to impose death. *Id.* at 890.

Petitioner Clemons seizes upon the reservation in *Zant* to argue that in a "weighing state," such as Mississippi, invalidation of any aggravating factor compels reversal of the death judgment. Amici urge rejection of petitioner's argument for several reasons: (1) opinions of this Court subsequent to *Zant*, but ignored by petitioner, permit the reweighing of aggravating and mitigating factors by appellate courts; (2) the distinction between statutory schemes mentioned in *Zant* has been given virtually no continuing legal significance; and (3)

a substantial number of the state appellate courts which have considered this issue in light of their statutory schemes and this Court's decisions have found that reversal of an aggravating factor does not necessarily compel a new sentencing hearing.

In *Barclay v. Florida*, *supra*, 463 U.S. at 939, the Court relied upon *Zant* in affirming a Florida death sentence despite the state trial court's consideration of an aggravating factor that was prohibited by state law. The Court noted that the Florida statute, unlike the Georgia procedures at issue in *Zant*, requires the sentencer "to balance statutory aggravating circumstances against all mitigating circumstances . . . ." 463 U.S. at 954. It nevertheless found "no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." *Id.* at 958. The Court subsequently relied upon *Barclay* to uphold the Florida Supreme Court's "independent reweighing of the aggravating and mitigating circumstances" and affirmance of a death judgment despite the trial court's consideration of improper

aggravation. *Wainwright v. Goode*, *supra*, 464 U.S. at 87.

Zant, *Barclay*, and *Goode* involved aggravating circumstances which, although improper under state law, were not precluded by the United States Constitution. In *Maynard v. Cartwright*, *supra*, 108 S.Ct. at 1859, the Court found that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague. The sentencing jury had also found a second, unchallenged aggravating circumstance. This Court concluded that the Oklahoma Court of Criminal Appeals should decide whether that circumstance was sufficient under state law to affirm the death judgment, or whether a new sentencing hearing should be conducted. *Id.* at 1860.[3/] Not surprisingly, the Mississippi Supreme Court relied upon *Maynard* in affirming petitioner's death sentence despite an arguably invalid heinous and atrocious aggravating circumstance. *Clemons v. State*, 535 So.2d 1354, 1362-1363 (Miss. 1988).

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3. By decisional law, the Oklahoma court had recently expanded its authority to affirm a death judgment despite the invalidation of an aggravating circumstance. These Oklahoma cases are discussed below.

The admission of improper aggravation was also considered in *Johnson v. Mississippi*, ___ U.S. ___, 108 S.Ct. 1981 (1988). There the jury found as one of three aggravating circumstances supporting the death penalty that the defendant was previously convicted of a felony involving the use or threat of violence. That prior conviction had occurred in New York but was reversed by the courts of that state subsequent to the Mississippi trial. This Court reversed the death judgment, noting that the Mississippi jury knew of the New York conviction but not about any of the facts upon which it was based. 108 S.Ct. at 1986. The Court also observed that the Mississippi Supreme Court had expressly refused to undertake a harmless error analysis, in part because of the emphasis placed on the prior conviction by the prosecutor. *Id.* at 1988-1989 & n. 8. "[M]ore importantly, the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible." *Id.* at 1989. Two members of the Court commented, however, that the Mississippi Supreme Court could still "undertake[] to reweigh the two untainted aggravating circumstances against the mitigating circumstances" in deciding whether a new

sentencing hearing was required. *Id.* at 1989 (White, J., concurring).

This Court has reiterated in recent terms that cases in which harmless error analysis will not apply "are the exception and not the rule." *Rose v. Clark*, 478 U.S. 570, 578 (1986). The Court has expressly applied such analysis to the admission of evidence in violation of the Sixth Amendment at the sentencing phase of a capital case. *Satterwhite v. Texas*, *supra*, 108 S.Ct. at 1798; *see also Cabana v. Bullock*, 474 U.S. 376 (1986) (factual findings required by the Eighth Amendment can be made by the state trial or appellate courts); *Strickland v. Washington*, 466 U.S. 668, 695 (ineffective assistance of counsel in the penalty phase of a capital case does not require reversal unless "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death"). The cases authorizing affirmance of a death sentence despite the reversal of some aggravating circumstances are consistent with this trend.

Barclay, *Maynard*, and *Johnson* undermine petitioner's reliance on the question reserved in *Zant*. Moreover, the legal significance of any distinction

between statutes which expressly require the weighing of aggravating and mitigating circumstances and those which do not has been substantially eliminated. As the Court noted in *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 2331, n. 12, "the differences between the two systems may be even less than it appears at first examination." *See Coleman v. Saffle*, 869 F.2d 1377, 1388 (10th Cir. 1989).

The Fifth Circuit, in a post-*Maynard* examination of Mississippi law, recently concluded that there is "no difference, other than one in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence." *Stringer v. Jackson*, 862 F.2d 1108, 1115 (5th Cir. 1988). We agree with this evaluation. Amici submit that whatever procedure a state may follow in determining whether death is the appropriate punishment, it is entitled to review the judgments for prejudice and to affirm a death sentence despite the erroneous consideration of aggravating evidence or circumstances if such error was harmless.

The application of harmless error analysis to the penalty phase is best left

to the courts of the individual states. Some courts have concluded that a retrial is necessary following the reversal of an aggravating circumstance, even if other, valid circumstances remain. *See, e.g., Wilson v. State*, 295 Ark. 682, 751 S.W.2d 734, 737-739 (1988); *Hopkinson v. State*, 632 P.2d 79, 171-172 (Wyo. 1981).

Until recently, the Oklahoma Court of Criminal Appeals took a similarly restrictive view of its authority, and reversed the entire death sentence when any aggravating circumstance was reversed. *See Boutwell v. State*, 659 P.2d 322, 329 (Okla. Crim. 1983). In *Stouffer v. State*, 742 P.2d 562, 564-565 (Okla. Crim. 1987), however, the state court concluded that its refusal to apply harmless error analysis was "unnecessarily deferential in light of the authority and responsibility given [the] Court by the Legislature to review capital sentences." Upon reversal of an aggravating circumstance, the Oklahoma court will now reweigh the remaining aggravating circumstances with any mitigating circumstances, and will affirm when there is no reasonable probability of a different result. *Nguyen v. State*, 769 P.2d 167, 174-175 (Okla. Crim. 1988); *Castro v. State*, 749 P.2d 1146, 1147-1148 (Okla. Crim. 1987).

Oklahoma's position is in line with those of a substantial number of other death penalty states. Those courts have affirmed death judgments despite a finding that one or more aggravating circumstances were improper. *See, e.g., Baldwin v. State*, 456 So.2d 117, 125-128 (Ala.Crim.App. 1983), *aff'd Ex parte Baldwin*, 456 So.2d 129, 140 (Ala. 1984) (consideration of nonstatutory aggravating circumstance was harmless in light of remaining valid circumstances); *State v. Poland*, 144 Ariz. 412, 698 P.2d 207, 210-211 (1985) (one aggravating circumstance remained; mitigation was insignificant); *People v. Bittaker*, 48 Cal.3d 1046, 1102-1103, 774 P.2d 659, 691-692, 259 Cal.Rptr. 630, 662-663 (1988) (a single valid special circumstance finding is sufficient to render defendant eligible for the death penalty; since there were at least 14 valid special circumstances, even if other 24 were invalid, defendant could not have been prejudiced); *Flamer v. State*, 490 A.2d 104, 135-136 (Del. 1983) (presence of invalid aggravating circumstance was harmless); *Mitchell v. State*, 527 So.2d 179, 182 (Fla. 1988) (three aggravating circumstances remained; no mitigation); *Foster v. State*, 258 Ga. 736, 374 S.E.2d 188, 196-197 (1988) (assuming invalidity of one aggravating circumstance, remaining

circumstance was supported by the record and justified the death sentence); *State v. Tassin*, 536 So.2d 402, 412 (La. 1988) (reversed aggravating factor did not inject an arbitrary factor into the proceedings); *Clemons v. State*, *supra*, 535 So.2d at 1362 (one remaining valid aggravating factor will support the death penalty); *State v. Johns*, 679 S.W.2d 253, 267 (Mo. 1984) (judgment may be affirmed so long as as one aggravating factor remains); *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761, 784-785 (1981) (use of inadmissible evidence to support aggravating circumstance did not compromise the statutory weighing process); *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246, 262 (1988) (one aggravating circumstance remained; no mitigation); *State v. Jones*, 288 S.C. 1, 340 S.E.2d 782, 783-784 (1985) (assuming two out of five aggravating circumstances were improper, any one valid factor would support the imposition of death); *State v. Bobo*, 727 S.W.2d 945, 955-956 (Tenn. 1987) (two of three aggravating factors remained; little evidence of mitigation); *Stout v. Commonwealth*, 237 Va. 126, 376 S.E.2d 288, 292 (1989) (the invalidity of one aggravating circumstance does not require reversal so long as at least one valid circumstance remains).

The federal courts have recognized that the application of harmless error when aggravating circumstances have been reversed is primarily an issue of state law. For example, the Eighth Circuit reversed an Arkansas death sentence because there was no provision for saving it under state law after an aggravating circumstance had been invalidated. *Collins v. Lockhart*, 754 F.2d 258, 267-268 (8th Cir. 1985). The same court affirmed a Missouri judgment, however, because state law did not mandate reversal simply because one aggravating factor was reversed. *Mercer v. Armontrout*, 844 F.2d 582, 584 (8th Cir. 1988). *See also Coleman v. Saffle*, *supra*, 869 F.2d at 1387-1390; *Lindsey v. Thigpen*, 875 F.2d 1509, 1515 (11th Cir. 1989) (assuming invalidity of one aggravating circumstance, under Alabama law three remaining factors plus no mitigation rendered any error harmless); *Stringer v. Jackson*, *supra*, 862 F.2d at 1113-1115; *Neuschafer v. Whitley*, 816 F.2d 1390, 1393 (9th Cir. 1987) (under Nevada law, the death judgment was adequately supported by valid aggravating factors and no mitigation).

A number of state courts have held, as did this Court in *Satterwhite v. Texas*, *supra*, 108 S.Ct. at 1798, that penalty

phase errors, including but not limited to those involving the review of aggravating circumstances, are subject to review for prejudice. The California Supreme Court in particular has carefully distinguished between errors of federal constitutional dimension and those which are strictly a violation of state law. In *People v. Brown*, 46 Cal.3d 432, 758 P.2d 1135, 250 Cal.Rptr. 604 (1988), the court recognized that the importance of insuring reliability in death sentences does not compel a reversal on the mere possibility that penalty phase error was prejudicial. 46 Cal.3d at 448, 758 P.2d at 1145, 250 Cal.Rptr. at 614-615. "Instead, when faced with penalty phase error not amounting to a federal constitutional violation, [the court] will affirm the judgment unless [it] conclude[s] there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred." *Id.*[4] *See also*, *People v.*

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4. There is "little, if any, difference between" the reasonable possibility test of *Brown* and the beyond a reasonable doubt test adopted by this Court for federal constitutional violations. *Chapman v. California*, 386 U.S. 18, 24 (1967). North Carolina also applies a reasonable possibility test to sentencing phase errors. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439, 448-449 (1981).

Sheldon, 48 Cal.3d 935, 950-952, 771 P.2d 1330, 1338-1339, 258 Cal.Rptr. 242, 250-251 (1989) (improper admission of aggravating evidence); *People v. McLain*, 46 Cal.3d 97, 109, 757 P.2d 569, 575, 249 Cal.Rptr. 630, 636 (1988) (under *Chapman* the improper exclusion of mitigating evidence was harmless).

The determination by state courts that sentencing error is properly subject to harmless error analysis is tempered by their recognition of the need to review death judgments carefully and reverse when the error affects the reliability of the result. *See, e.g., People v. Anderson*, 43 Cal.3d 1104, 1150-1151, 742 P.2d 1306, 1333, 240 Cal.Rptr. 585, 613 (1987); *Skull v. State*, 533 So.2d 1137, 1143 (Fla. 1988); *Wade v. State*, 258 Ga. 324, 368 S.E.2d 482, 488-489 (1988); *Scott v. State*, 297 Md. 235, 465 A.2d 1126, 1135-1136 (1983); *Moran v. State*, 734 P.2d 712 (Nev. 1987); *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439, 448-449 (1981); *Brown v. State*, 753 P.2d 908, 913 (Okla. Crim. 1988); *Commonwealth v. Aulisio*, 514 Pa. 84, 522 A.2d 1075, 1080 (1987). Indeed, state courts have accepted the responsibility for reversing death

judgments even when state law precludes a new sentencing trial. *State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744, 747-748 (1987).[5/]

It is clear from a review of the cases that state appellate courts "scrutinize the penalty phase of capital trials with considerable care . . . ." *People v. Murtishaw*, 48 Cal.3d 1001, 1028, 773 P.2d 172, 189, 258 Cal.Rptr. 821, 838 (1989). The truth of that observation is not undermined (indeed, it is affirmatively demonstrated) when death judgments are affirmed despite the existence of penalty phase error. Nothing in the Eighth Amendment precludes the state from affirming the sentence of death when that result is otherwise reliable.

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5. Until recently, the Pennsylvania Supreme Court was compelled to remand for imposition of a life sentence whenever it vacated a death judgment. *Commonwealth v. Aulisio*, 514 Pa. 84, 522 A.2d 1075, 1080 (1987). The statutes were amended in 1988 to authorize the granting of a new sentencing hearing. 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(ii) (Purdon).

CONCLUSION

For the reasons stated above, Amici respectfully submit that the judgment of the Mississippi Supreme Court should be affirmed.

DATED: October 30, 1989

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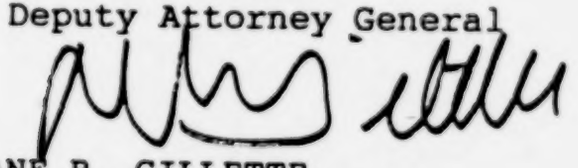

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